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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**

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10 DAVID VAN DUKE,

Case No. 2:13-cv-00688-APG-PAL

11 Petitioner,

**ORDER**

12 v.

13 DWIGHT NEVEN, et al.,

Respondents.

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15 This is a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254,  
16 by a Nevada state prisoner. The petition asserts three grounds for relief related to  
17 petitioner's state court convictions for (1) failure to stop on signal of a police officer, (2)  
18 trafficking in a controlled substance, and (3) transport of a controlled substance. (ECF  
19 No. 1 at 2).<sup>1</sup>

20 On June 30, 2014, the court entered an order granting the respondents' motion to  
21 dismiss. (ECF No. 25). The court dismissed Ground One of the petition as conclusory  
22 and found several allegations in Grounds Two and Three to be unexhausted. The court  
23 also denied petitioner leave to amend to include several additional claims, in part because  
24 petitioner failed to comply with Local Rule 15-1(a) by including a complete amended  
25 petition and in part because the claims were unexhausted. The court advised petitioner  
26 that it could not proceed on his mixed petition and outlined his options, which included  
27 filing a motion to stay and abey. (See ECF No. 25).

28 <sup>1</sup> Page numbers refer to the CM/ECF number at the top of the page.

1 On July 16, 2014, petitioner filed a motion to stay and abey. (ECF No. 26). Three  
2 months later, petitioner filed a motion to “unstay,” asserting that he had filed a second  
3 state habeas petition and that the Nevada Supreme Court had ruled on it. (ECF No. 28).

4 On April 27, 2015, the court entered an order finding that petitioner satisfied the  
5 requirements for a stay but deferring entry of the stay pending supplemental briefing.  
6 (ECF No. 33). The court directed the parties to address whether the claims it previously  
7 found unexhausted were procedurally defaulted in light of the Nevada Supreme Court’s  
8 decision, which affirmed the denial of the second state habeas petition as untimely,  
9 successive, and an abuse of the writ. (See Ex. 117).<sup>2</sup> The supplemental briefs (ECF  
10 Nos. 38 & 39) are now before the court.

11 A review of the record indicates that most of the claims raised by petitioner in his  
12 second state habeas petition are not part of the petition in this case. Petitioner’s second  
13 state habeas petition asserted three grounds for relief:

- 14 1. Ground One: Ineffective assistance of counsel and due process because  
15 collateral post-conviction counsel failed to raise or argue a “mere presence”  
16 defense (Ex. 100 at 6);
- 17 2. Ground Two: Ineffective assistance of counsel because trial counsel failed to  
18 investigate and failed to raise a “mere presence” defense, (*id.* at 7); and
- 19 3. Ground Three: Ineffective assistance of counsel because trial counsel failed to  
20 object to inconsistent testimony and failed to request an inconsistent testimony  
21 instruction, (*id.* at 8).

22 However, none of these claims is part of the operative petition in this case. In its order of  
23 June 30, 2014, the court denied petitioner leave to amend his petition to include claims  
24 based on ineffective assistance of post-conviction counsel, trial counsel’s failure to raise  
25 or argue a “mere presence” defense, and trial counsel’s failure to object to inconsistent  
26 testimony or request an inconsistent testimony instruction. (See ECF No. 25 at 4-5). The  
27 court also dismissed as conclusory Ground One of the petition, which asserted that

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28 <sup>2</sup> Exhibits 100 to 119 of the state court record are located at ECF No. 32.

1 counsel was ineffective for failing to conduct an adequate investigation or provide a  
2 meaningful defense. (ECF No. 25 at 6-7). Thus, petitioner's second state habeas petition  
3 served to exhaust only claims that are not part of this petition and -- with one possible  
4 exception -- none of the claims the court previously found unexhausted.

5 The second state habeas petition may have exhausted one claim of the operative  
6 petition. In its order of June 30, 2014, the court noted that the petition could be read to  
7 assert a substantive sufficiency of the evidence claim challenging petitioner's  
8 transportation conviction. (See ECF No. 25 at 10; ECF No. 6 at 10). A liberal construction  
9 of the second state habeas petition reveals a possible substantive sufficiency of the  
10 evidence on the transportation conviction. (Ex. 103 (Supp. to Petition at 6)). Given  
11 petitioner's latest assertion that his "only lawful sentence is transporting," (see ECF No.  
12 19 at 2; see also ECF No. 39 at 6), it is not even clear that this is one of petitioner's claims.  
13 However, to the extent it is, it is procedurally barred.

14 A federal court cannot review even an exhausted claim "if the Nevada Supreme  
15 Court denied relief on the basis of 'independent and adequate state procedural grounds.'"  
16 *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). The Nevada Supreme Court  
17 dismissed petitioner's second habeas petition as untimely and successive and therefore  
18 procedurally barred.

19 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails  
20 to comply with the state's procedural requirements in presenting his claims is barred from  
21 obtaining a writ of habeas corpus in federal court by the adequate and independent state  
22 ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A state  
23 procedural bar is "adequate" if it is "clear, consistently applied, and well-established at the  
24 time of the petitioner's purported default." *Calderon v. United States District Court (Bean)*,  
25 96 F.3d 1126, 1129 (9th Cir. 1996). A state procedural bar is "independent" if the state  
26 court "explicitly invokes the procedural rule as a separate basis for its decision." *Yang v.*  
27 *Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). A state court's decision is not "independent"

1 if the application of the state's default rule depends on the consideration of federal law.  
2 *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000).

3 Where such a procedural default constitutes an adequate and independent state  
4 ground for denial of habeas corpus, the default may be excused only if "a constitutional  
5 violation has probably resulted in the conviction of one who is actually innocent," or if the  
6 prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v.*  
7 *Carrier*, 477 U.S. 478, 496 (1986).

8 To demonstrate cause for a procedural default, the petitioner must "show that  
9 some objective factor external to the defense impeded" his efforts to comply with the state  
10 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment  
11 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499  
12 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears "the  
13 burden of showing not merely that the errors [complained of] constituted a possibility of  
14 prejudice, but that they worked to his actual and substantial disadvantage, infecting his  
15 entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599,  
16 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

17 The Nevada Supreme Court affirmed denial of petitioner's second petition as  
18 successive and untimely under Nev. Rev. Stat. § 34.810 and § 34.726. (Exs. 107 & 117).  
19 The Ninth Circuit has held that the Nevada Supreme Court's application of the timeliness  
20 rule in § 34.726(1) is an independent and adequate state law ground for procedural  
21 default. *Moran v. McDaniel*, 80 F.3d 1261, 1268–70 (9th Cir. 1996); see also *Valerio v.*  
22 *Crawford*, 306 F.3d 742, 778 (9th Cir. 2002). The Ninth Circuit also has held that, at least  
23 in non-capital cases, Nev. Rev. Stat. § 34.810 is an independent and adequate state  
24 ground for procedural default. *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003);  
25 *Bargas v. Burns*, 179 F.3d 1207, 1210–12 (9th Cir. 1999). The Nevada Supreme Court's  
26 decision in this case did not depend on the application of federal law in deciding that the  
27 claim was procedurally defaulted. Accordingly, the Nevada Supreme Court relied on  
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1 independent and adequate state law grounds in affirming the dismissal of petitioner's  
2 second state habeas petition as untimely and successive.

3 Although petitioner's supplemental brief on the procedural default issue asserts  
4 "actual innocence," it does not assert petitioner was actually innocent of the transportation  
5 conviction. (See ECF No. 39 at 6). Petitioner does not otherwise argue cause and  
6 certainly does not argue prejudice with respect to this claim, as he concedes that the  
7 evidence was sufficient to convict him of transportation. (See *id.*). Accordingly, the  
8 procedural default of this claim cannot be excused. To the extent that Ground Three  
9 raises a substantive sufficiency of the evidence claim as to the transporting conviction,  
10 then, that portion of Ground Three will be dismissed as procedurally barred.

11 Accordingly, the following claims of the petition remain unexhausted: (1) Ground  
12 Two to the extent it asserts ineffective assistance of counsel due to counsel's failure to  
13 "Blackstone the preliminary hearing";<sup>3</sup> (2) Ground Two to the extent it asserts a due  
14 process violation because petitioner did not receive a copy of the preliminary hearing  
15 transcript before trial; (3) Ground Three to the extent it asserts ineffective assistance of  
16 appellate counsel for failing to challenge the sufficiency of the verdict as to count burglary  
17 as well as instructions 4 and 5 defining burglary to the jury<sup>4</sup>; (4) Ground Three to the  
18 extent it asserts a substantive sufficiency of evidence claim based on a lack of fingerprint  
19 evidence; (5) Ground Three to the extent it asserts an ineffective assistance of counsel  
20 claim based on appellate counsel's failure to argue insufficient evidence due to a lack of  
21 fingerprint evidence; and (6) Ground Three to the extent it asserts a substantive double  
22 jeopardy claim.

23 As the petition in this case remains mixed, the court cannot proceed on the petition  
24 as is. See *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (holding that a federal court may not

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26 <sup>3</sup> In his supplemental brief (ECF No. 39), petitioner argues that he raised the "Blackstone" preliminary hearing claim  
27 repeatedly since the beginning of his state court case. While it is true that petitioner has argued issues relating to  
28 the preliminary hearing throughout his criminal and state collateral proceedings, he has never presented the Nevada  
Supreme Court with a claim that counsel failed to "Blackstone" the preliminary hearing. The claim therefore is  
unexhausted.

<sup>4</sup> As noted in the court's prior order, petitioner was not charged with or convicted of burglary in this case.

1 entertain a habeas petition unless the petitioner has exhausted available and adequate  
2 state court remedies with respect to all claims in the petition and that a “mixed” petition  
3 containing both exhausted and unexhausted claims is subject to dismissal). Although  
4 petitioner previously filed a motion to stay under similar circumstances, the motion was  
5 followed a short time later by a motion to “unstay.” The court therefore cannot ascertain  
6 what petitioner would like to do with his still-mixed petition. Accordingly, the prior order  
7 of the court granting and deferring entry of a stay will be vacated, and petitioner will be  
8 directed to decide whether he would like to dismiss the unexhausted claims and proceed  
9 on his exhausted claims, dismiss the entire petition without prejudice, or file a motion for  
10 other relief, such as to stay and abey the exhausted claims so that petitioner can exhaust  
11 the unexhausted claims.

## 12 **Conclusion**

13 IT IS THEREFORE ORDERED that to the extent Ground Three asserts a  
14 substantive sufficiency of the evidence claim as to the transportation conviction, that part  
15 of Ground Three is DISMISSED as procedurally defaulted.

16 IT IS FURTHER ORDERED that the court’s order of March 19, 2015, (ECF No.  
17 33) is vacated to the extent – but only to the extent -- it granted and deferred entry of a  
18 stay of this action.

19 IT IS FURTHER ORDERED that petitioner’s motion to stay (ECF No. 26) is denied  
20 without prejudice.

21 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from entry of  
22 this order within which to mail to the Clerk for filing either: (1) a motion to dismiss seeking  
23 partial dismissal only of the unexhausted claims described in this order; (2) a motion to  
24 dismiss the entire petition without prejudice in order to return to state court to exhaust the  
25 unexhausted claims; and/or (3) a motion for other appropriate relief, such as a motion for  
26 a stay and abeyance asking this court to hold his exhausted claims in abeyance while he  
27 returns to state court to exhaust the unexhausted claims.

1 Petitioner is advised to familiarize himself with the limitations periods for filing  
2 federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations periods  
3 may have a direct and substantial effect on whatever choice he makes regarding his  
4 petition.

5 If a motion as provided for herein is not timely mailed for filing, the entire petition  
6 will be dismissed without prejudice for lack of complete exhaustion.

7 Dated: November 13, 2017.

  
8 ANDREW P. GORDON  
9 UNITED STATES DISTRICT JUDGE  
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